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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

No. 838. October Term, 1935

FREDERICK L. MOREHEAD, as the Warden of the City Prison of the Borough of Brooklyn,

Petitioner,

against

PEOPLE *ex rel.* JOSEPH TIPALDO,

Respondent.

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

March 25, 1936.

PAUL WINDELS,
Corporation Counsel of the City of New York,
Amicus Curiae.

PAXTON BLAIR,
PAUL J. KERN,
of Counsel.

Supreme Court of the United States

No. 838. October Term, 1935

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PEOPLE *ex rel.* JOSEPH TIPALDO,

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BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR CERTIORARI.

Preliminary Statement.

The legislation which the Court of Appeals of the State of New York held in contravention of the Fourteenth Amendment made it a misdemeanor for employers in certain industries to pay their female employees wages less than those fixed by certain mandatory minimum fair wage orders issued by the Industrial Commissioner of the State of New York. L. 1933, ch. 584. The specific offense committed by the relator-respondent was the crime of forgery in that he falsified his books to conceal his non-compliance with the minimum wage law.

Since the pleadings show that only the Federal Constitution was relied on by the relator-respondent to secure his discharge, and since *Adkins* v. *Children's Hospital*, 261 U. S. 525 (1923), was not only the foundation stone but the superstructure as well of the opinion below, this Court has jurisdiction to grant the writ. *Red Cross Line* v. *Atlantic Fruit Company*, 264 U. S. 109, 120 (1924); *Blodgett* v. *Silberman*,

277 U. S. 1, 7 (1928). Furthermore, when a State Constitution and the United States Constitution employ the same phrase, the mimetic conduct of a State court of last resort in deciding, on the authority of a decision of this Court construing the United States Constitution, that a given statute offends both constitutions cannot, in the last analysis, be said to rest upon a State ground adequate to support it.

The interest of the City of New York in sustaining the constitutionality of the minimum wage law is two-fold.

(1)

In the first place, when non-subsistence wages are paid to any persons, the burden of preventing the starvation or debilitation and susceptibility to disease which would otherwise overtake such persons falls upon the public welfare agencies of the locality where such persons reside. Actually the Department of Public Welfare of the City of New York each month expends more than $9,000,000 (partially State contributed) in assisting those who are unable to support themselves. A large part of this sum is expended to supplement privately earned incomes which, while representing the total earning capacity of the recipient, are still grossly inadequate for the support of the family unit depending thereon. Of this portion a large amount is spent for the assistance of women who, although employed, are still unable to support themselves due to the substandard wages of private business.

A survey made in October, 1935 (15 N. Y. Indust. Bul. 40) of 280,568 families aided by the Department of Public Welfare revealed in such families 4,008 women who, though employed in industry, were unable to support themselves out of their wages and were compelled to appeal to t[illegible]

Department for aid. The statute under attack gives the Industrial Commissioner power to correct this situation.

Public funds were thus diverted from the relief of the unemployed and the physically helpless to the relief of those whose employers neglected or refused to pay them a living wage. The result is a shocking and indefensible compulsion exercised upon the City to subsidize unconscionable employers who, were the challenged statute upheld, would be required to pay their workers at least at subsistence levels.

Statistics of families wherein school children required aid from the National Youth Administration revealed that of 413 aided families (whose children attended a single school), there were in 88 of them women employed at non-subsistence wage levels. One-half of these women were receiving less than $10 a week.

In the laundry business, the survey revealed over one-half of the workers receiving an average of less than $10.00 a week, the subsistence level being $11.00. Under the assailed statute, however, conditions were improved so that only 9% were receiving less than the subsistence figure.

In the restaurant business, the survey revealed 6,239 women workers receiving an average of $8.28 a week. Over 17% were paid under $4.00.

(2)

In the second place, the City is interested in sustaining the assailed legislation because it tends to eliminate police and health problems which accompany the payment of sub-standard scales of wages.

Much that was said in *Matter of New York City Housing Authority* v. *Muller*, 270 N. Y. (Mar. 17, 1936), is applicable here. The Court of Appeals there upheld a statute

which authorized the use of public funds and the power of eminent domain to clear slums and erect sanitary low-price tenements in their stead. The Court said:

> "Slum areas are the breeding places of disease which take toll not only from denizens, but, by spread, from the inhabitants of the entire city and State. Juvenile delinquency, crime and immorality are there born, find protection and flourish. Enormous economic loss results directly from the necessary expenditure of public funds to maintain health and hospital services for afflicted slum dwellers and to war against crime and immorality. Indirectly there is an equally heavy capital loss and a diminishing return in taxes because of the areas blighted by the existence of the slums. Concededly, these are matters of State concern (*Adler* v. *Deegan*, 251 N. Y. 467, 477), since they vitally affect the health, safety and welfare of the public."

Workers who are paid non-subsistence wages are forced to live in slums, or in slum conditions. Legislation aimed to raise their wages to subsistence levels will operate to lessen the slum problem.

Conclusion.

We ask this Court to grant a writ of certiorari herein in order that the doctrine of *Adkins* v. *Children's Hospital*, 261 U. S. 525 (1923) may be inquired into afresh, and the attention of the Court focussed upon the one outstanding, publicly recognized and acknowledged development of the last decade: *i. e.*, the now incontrovertible fact that non-subsistence wages operate in the long run as an outrageous burden upon public welfare agencies, and as a shocking

subsidy to those employers who by reason of their selfishness and greed are the last persons in the world entitled to claim to be the recipients of public aid.

Dated, New York, N. Y., March 25, 1936.

Respectfully submitted,

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Corporation Counsel of the City of New York,
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Supreme Court of the United States

No. 838—October Term, 1935.

FREDERICK L. MOREHEAD, as the Warden of the City Prison of the Borough of Brooklyn,

Petitioner,

against

PEOPLE *ex rel.* JOSEPH TIPALDO,

Respondent.

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF REVERSAL.

April 24, 1936.

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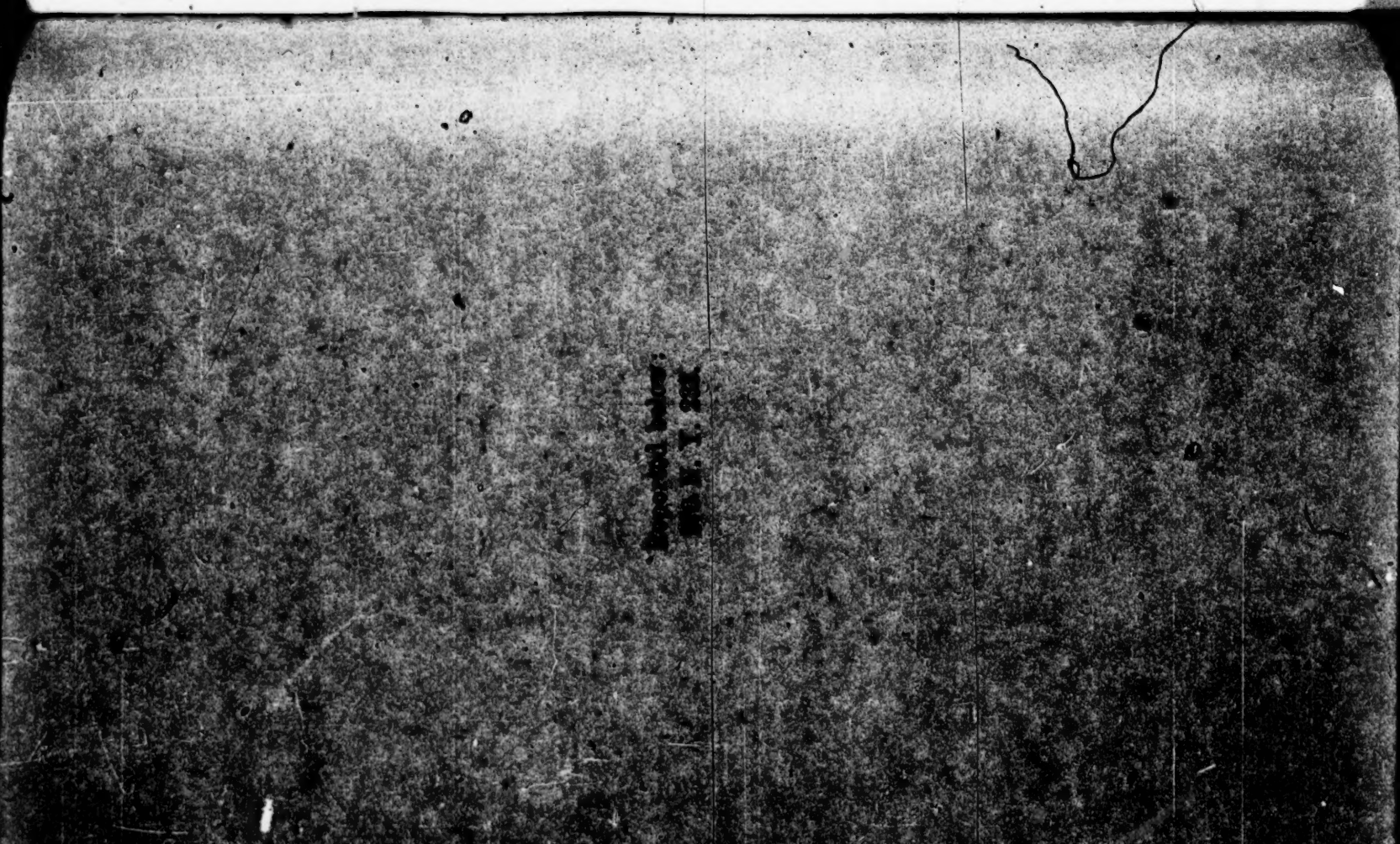

Supreme Court of the United States

No. 838—October Term, 1935.

FREDERICK L. MOREHEAD, as the Warden of the City Prison of the Borough of Brooklyn,

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PEOPLE *ex rel.* JOSEPH TIPALDO,

Respondent.

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF REVERSAL.

Preliminary Statement.

It is the purpose of this brief to discuss briefly the constitutional question and to show certain conditions prevalent in the City of New York, where a majority of the persons affected by the challenged legislation (N. Y. Laws 1933, ch. 584) live and work, and where the nullification of that legislation would be attended by consequences of unusual gravity.

POINT I.

The prevention of indigency, the lifting of burdens on public welfare agencies and the maintenance of decent living conditions justify the challenged legislation and render it constitutional.

An astute writer on public affairs has said:

> "It has, I think, been clearly established that government must henceforth hold itself consciously responsible for the maintenance of the standard of life prevailing among the people. This is, I believe, a new imperative which takes its place alongside the older imperatives to defend the nation against attack and to preserve domestic peace." WALTER LIPPMANN, *The New Imperative* (1935), p. 1. And see *id.*, pp. 14, 34.*

The foregoing synthesis is in harmony with the observations on minimum wage legislation made many years ago by COMMONS and ANDREWS, *Principles of Labor Legislation* (Rev. Ed., 1927), p. 195, where they said:

> "Work may be done under safe and sanitary conditions for hours not too long, and payment of wages may be prompt and regular, but if the amount received is too small to secure the necessaries of life, the worker's health and welfare are menaced."

Moreover, among the various types and examples of social legislation designed to rescue the laboring classes

* See also MORTISHED, *The Social Basis of World Order*, in *Problems of Peace, Tenth Series* (1936), where it is said (p. 104): "* * * you cannot have good government unless you have good citizens, and * * * you cannot have good citizens, unless you have good social conditions."

from the consequences of the inequality of their bargaining power *vis-à-vis* the employers, minimum wage legislation stands in a place apart because it has the fortunate attribute of helping the employer as much as it helps the laborer. In the last cited work, this was clearly stated (pp. 198-199):

> "Moreover, a socially undesirable type of competition between employers flourishes when the bargaining power of employees is weak. The encouragement of superior ability and invention has always been pointed out as one of the chief advantages gained by the community from the competitive system of production. When an employer can hire workers for practically his own price, he can be slack and inefficient in his methods, and yet, by reducing wages, reduce his cost of production to the level of his more able competitor.
>
> Minimum wage legislation, therefore, is designed to answer the demands of social policy in two ways. By setting a barrier below which wages may not fall, it lightens the pitiful poverty and prevents the degeneration in body and spirit of those forced to live on a wage too small to supply the necessaries of life. Competition among them no longer takes the form of offering to work for lower wages, but that of developing greater efficiency. At the same time, employers are forced to compete in efficiency of management, thus securing for society at large the many advantages of constantly improved methods of production. Minimum wage laws attempt neither to destroy competition nor to fix wages by law; they merely seek to set the lower limits to both in the interests of society as a whole."

The foregoing factors are recognized in the instant statute, § 550, sixth sentence.

The legislation would therefore seem to possess certain claims to constitutionality not possessed either by the

Adamson Law (39 Stat. 721) or by the New York Emergency Rent Law, to both of which this Court has given its approval. *Wilson* v. *New*, 243 U. S. 332 (1917); *Marcus Brown Holding Co.* v. *Feldman*, 256 U. S. 170 (1921). For in both these cases there was really no *quid pro quo* conferred on the employers and the landlords.

Nor do the foregoing instances exhaust the list of constitutional statutes furnishing analogies (of varying degrees of closeness) to the statute now before the Court.

The inarticulate major premise is stated in the quotation from Lippmann, *supra*, page 2. It might also be stated thus: The legislature, aiming to reduce the constant risk to which the general public is exposed that persons may become public charges, accomplishes this by increasing the catalogue of relational duties, so as to dissipate the risk referred to. If this can be accomplished by finding somebody on whom the prospective *public* charge can be imposed as a *private* charge or personal liability, then any legislation adapted to that end, should, if the parties are so situated by virtue of existing statutory precedents as to bear a relational rather than a contractual duty toward each other, be sustained as constitutional.

We acknowledge that the foregoing involve two admissions, both of which we make without hesitation. One is that between employer and employee, liberty of contract has already become a "vanishing fiction".* The other is that, within that field, the modern movement is from contract to status, Sir HENRY MAINE's thesis (*Ancient Law*, ch. V, *ad fin.*) having been reversed.†

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* We borrow the phrase from *Williamson* v. *Osenton*, 232 U. S. 619, 625 (1914), where it was used in a different connection. See also *Bosley* v. *McLaughlin*, 236 U. S. 385, 392 (1915).

† See HAROLD J. LASKI, *The Pluralistic State*, 28 Philosophical Rev. 562, 568 (1919).

Returning to our analogies among statutes designed to prevent a multiplication of public charges, we find workmen's compensation laws readiest to hand. Injuries occurring without fault of the employer, and hence non-compensable on common law principles, made the injured individual a public charge. The legislature passes the burden on to the industry, and the statute is sustained because the employer is simply being made to bear the burden of injuries primarily, if not proximately, caused by the employment. *New York Central R. Co.* v. *White*, 243 U. S. 188, 205 (1917).

In the case just cited, Mr. Justice PITNEY in upholding the New York Workmen's Compensation Law (L. 1913, ch. 816, as amended) referred with apparent approval to the general principles put forward by the Attorney-General, Mr. Woodbury, to justify the law against constitutional challenges. In his opinion he said (243 U. S., at p. 197):

> "In support of the legislation, it is said * * * that under the present system the injured workman is left to bear the greater part of industrial accident loss, which because of his limited income he is unable to sustain, so that he and those dependent on him are overcome by poverty and frequently become a burden upon public or private charity; * * *."

By parity of reasoning, we ask this Court to deem the statute at bar justified as an endeavor on the legislature's part to prevent women from becoming "a burden upon public or private charity". And it is unnecessary to remind this Court that there "is a strong presumption that a legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience, and that its discriminations

are based upon adequate grounds." *Middleton* v. *Texas Power & Light Co.*, 249 U. S. 152, 157 (1919).

Related to workmen's compensation laws by the common feature of distribution of risk in such a way as to reduce the likelihood of a class of people becoming public charges is the recent New York State pay-roll tax law, L. 1935, ch. 468. This was declared constitutional in *Chamberlin, Inc.* v. *Andrews*, 271 N. Y. (April 15, 1936), and CRANE, Ch. J., in the course of the opinion which he wrote for the majority of the Court said:

> "The fact is that in the past few years enormous sums of State and Federal moneys have been spent to keep housed and alive the families of those out of work who could not get employment. Such help was absolutely necessary, and it would be a strange sort of government, in fact no government at all, that could not give help in such trouble.
>
> The Legislature of the State, acting after investigation and study upon the report of experts, has proposed what seems to it a better plan. Instead of solely taxing all the people directly, it has passed a law whereby employers are taxed for the help of the unemployed, the sums thus paid being cast upon the public generally through the natural increase in the prices of commodities. Whether relief be under this new law of the Legislature or under the dole system the public at large pays the bill."

The prevention of indigency and the attendant increased burden on public welfare agencies were doubtless the motivating force behind the legislature in passing an act prohibiting the assignment of wages to become due, which this Court sustained in *Mutual Loan Co.* v. *Martell*, 222

U. S. 225 (1911). The same force may be perceived, though less obviously, in the bank deposit guaranty statutes, of which an early example was upheld in *Noble State Bank* v. *Haskell*, 219 U. S. 104 (1911).

The legislation before the Court has a further merit. It tends to eliminate police and health problems which accompany the payment of oppressive scales of wages.

Much that was said in *Matter of New York City Housing Authority* v. *Muller*, 270 N. Y. 333 (1936), is applicable here. The Court of Appeals there upheld a statute which authorized the use of public funds and the power of eminent domain to clear slums and erect sanitary low-price tenements in their stead. The Court said (p. 339):

> "Slum areas are the breeding places of disease which take toll not only from denizens, but, by spread, from the inhabitants of the entire city and State. Juvenile delinquency, crime and immorality are there born, find protection and flourish. Enormous economic loss results directly from the necessary expenditure of public funds to maintain health and hospital services for afflicted slum dwellers and to war against crime and immorality. Indirectly there is an equally heavy capital loss and a diminishing return in taxes because of the areas blighted by the existence of the slums. Concededly, these are matters of State concern (*Adler* v. *Deegan*, 251 N. Y. 467, 477), since they vitally affect the health, safety and welfare of the public."

Workers who are paid oppressive wages are forced to live in slums, or in slum conditions. Legislation aimed to raise their wages to subsistence levels will operate to lessen the slum problem.

POINT II.

Conditions in New York City show the reality of the factual background portrayed in the preface to the statute (§ 550), and the grave consequences to be anticipated should it be overthrown.

(1)

It is a very obvious truth that when women are working full time for an employer and are not being paid a subsistence wage, the difference must come from some other source if life is to be maintained. That other source logically and normally is the nearest public welfare agency.*

The annual budgetary appropriation for the Department of Public Welfare of New York City in 1923 was $7,910,086.71. In 1935 it was $278,354,864.80.† The imperative necessity of doing something to keep this figure, already astronomical, from growing even larger must be obvious to every mind.

The direct burden upon public welfare agencies is made clear by the circumstance that between May and September, 1935, the Emergency Relief Bureau in New York City found it necessary to aid 4,254 women who were actually in employment, but whose average earnings were but $7.63 per week.‡

Furthermore, a survey made in October, 1935, and described at length in the Industrial Bulletin of the State of New York (Vol. 15, p. 40), showed that in 280,568

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* The burden upon public welfare agencies resulting from the payment of oppressive wage scales is a recognized justification for minimum wage laws. See COMMONS and ANDREWS, *op. cit.*, p. 212.

† This figure includes appropriations allocated to the City by the State and the Federal governments. In March, 1936, the Department expended $9,468,452.06 on relief. This figure does not take into consideration the contribution of the Federal Government, the expenditure of which is made under the direction of the Works Progress Administration.

‡ See petitioner's Factual Brief, page 177.

families aided by the Department of Public Welfare there were 4,008 women who, though employed in industry, were unable to support themselves out of their wages and were compelled to appeal to the Department for aid. The statute under attack gives the Industrial Commissioner power to correct this situation.

Public funds were thus diverted from the relief of the unemployed and the physically helpless to the relief of those whose employers neglected or refused to pay them a living wage. The result is a shocking and indefensible compulsion exercised upon the City to subsidize unconscionable employers who, were the challenged statute upheld, would be required to pay their workers at least at what the State has found fair.

(2)

The National Youth Administration, an organization whose purpose is to aid needy persons between the ages of 16 and 25 who are no longer in regular attendance at a school requiring full time,* has compiled statistics of 616 aided public school students in the five boroughs of Greater New York, where the pupil belonged to a family containing at least one fully employed woman. In 309 of the cases (or over 50%) the women were paid less than $11 a week, the level found by the Public Welfare Council to be the subsistence level.†

The cases of high school students whose families received aid from this organization (in February, 1936) have been tabulated with the following results:

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* Organized under Executive Order No. 7086, dated June 26, 1935. This Order was issued pursuant to authority conferred by U. S. Code, Tit. 15, § 728, sub-sec. 1 (49 Stat. 115).

† To the determination of this level intensive study has been given by welfare agencies for years. The Charity Organization Society currently places it at $10.25; the Jewish Social Service Association at $10.05; and the Emergency Relief Bureau at $10.00. In 1926 the National Industrial Conference Board placed it at $12.80.

High School	*Families Aided*	*Female Wage Earners*	*Average Weekly Wage*
MANHATTAN:			
Benjamin Franklin	105	9	$13.77
Haaren	315	42	8.52
Commerce	201	27	10.78
Julia Richman	413	88	10.10
Seward Park	360	35	13.71
Stuyvesant	120	14	13.90
Wadleigh	387	50	7.86
Washington Irving	179	29	11.70
BRONX:			
De Witt Clinton	145	27	10.20
Evander Childs	156	20	12.63
James Monroe	310	30	13.40
Morris	130	2	7.50
Theodore Roosevelt	214	9	11.88
Walton	80	10	12.98
BROOKLYN:			
Abraham Lincoln	131	7	14.93
Alexander Hamilton	63	6	8.92
Bay Ridge	42	7	13.36
Boys'	72	8	13.02
Brooklyn Technical	127	14	12.64
Bushwick	98	14	8.53
Eastern District	195	20	9.85
Erasmus Hall	52	7	11.36
F. K. Lane	124	11	13.23
Girls'	58	8	10.25
James Madison	55	7	12.35
Manual Training	104	16	11.41
New Utrecht	120	14	12.37
Samuel J. Tilden	124	9	12.99
Thomas Jefferson	89	11	15.27

High School	*Families Aided*	*Female Wage Earners*	*Average Weekly Wage*
QUEENS:			
Far Rockaway	35	9	$13.72
Grover Cleveland	73	9	9.19
Jamaica	104	17	9.38
John Adams	81	1	9.00
Newtown	55	6	16.09
Richmond Hill	36	4	10.50
RICHMOND:			
Curtis	55	5	12.80
Tottenville	53	6	14.30
Port Richmond	9	2	6.80

The average of all the figures in the right-hand column is $11.61. But taking the boroughs separately it falls below $11.00 (the subsistence level) in all the boroughs except Brooklyn and Richmond. The latter is the smallest of the five boroughs.

(3)

That oppressive wages drive their recipients to the public welfare agencies would seem to be demonstrative of the unsoundness of putting the sale of personal services on a parity with the sale of goods. The merchant who is unsuccessful can always turn from one line of goods to another, or give up merchandising and become a manual laborer; for the "new imperative" does not contemplate maintaining him in the higher status once he has failed. But if manual labor is his sole means of livelihood, he has no place to which to retreat if that fails to keep him alive. All he can do is to reduce his standard of living,—with con-

sequences not confined to himself, as *Matter of New York City Housing Authority* v. *Muller, ante*, p. 7, shows. Hence the unsuccessful seller of services (*i. e.*, the worker paid at non-subsistence wages) has, by virtue of the lack of alternatives before him, a claim to aid from the legislature which the unsuccessful merchant has not.

(4)

The Department of Correction of the City of New York has recently investigated over 150 cases of women arrested for vagrancy or for soliciting on the public streets employment as prostitutes. This survey reveals the following antecedent employments and wage scales as factors presumably contributing to the woman's taking up prostitution:*

Antecedent Employment	*Number*	*Wage Range (Per Week)*	*Average*
Waitress	18	$5 to $18	$8.50
Laundry worker	10	$4.80 to $15	10.88
Factory worker	11	$7 to $14	11.77
Miscellaneous	16	$4.50 to $18	9.79
	55		

(5)

Reduced to its lowest terms, the argument which we maintain is supported by the data hereinbefore set forth is that *industries ought to be self-supporting or quit.* Subsidies are legitimate and desirable when paid openly to concerns rendering a public service yet incapable of earning adequate income. But no industry has the right to avoid a

* Cases where antecedent employment was as a domestic servant or other occupation not covered by minimum wage legislation are omitted.

deficit or add to its profits by forcing an indirect subsidy from the public treasury. An industry which does so merits condemnation; and a statute which prevents the diversion, to unworthy recipients, of funds intended for the helpless and the jobless is as clearly constitutional as a statute which punishes larceny or frauds upon the government.

Conclusion.

The order of the Court of Appeals should be reversed and that of the Supreme Court, Kings County, affirmed.

Dated, April 24, 1936.

Respectfully submitted,

PAUL WINDELS,
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Amicus Curiae.

PAXTON BLAIR,
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